No. 10-482

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States

IN THE MATTER OF VELOCITA WORLDWIDE LOGISTICS, INC.,
Debtor.

DANIEL SHERMAN,
Petitioner,
v.
WILLIAM LAMOTHE, RAJAN SOBHANI, CHRIS BRACK, DANIEL ESTRADA, SCOTT STUDEBAKER, JAMES MICHAEL WALSH, BRANDON ROBINSON, AND PATRICK STRAYER,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Sherman respectfully submits this reply brief in support of his petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

ARGUMENT IN REPLY

Mr. Sherman believes this case presents an ideal vehicle for this Court to refine its instructions concerning certification of state law issues to state courts in non-diversity, non-*Pullman* cases. In opposition, Respondents have tendered a bitterly vituperative brief in which they accuse Mr. Sherman of intentionally misleading this Court at every turn. As he has throughout this litigation, Mr. Sherman yet again will ignore these personal attacks and focus solely on the legal issue.

The principal problem with Respondents' argument is its misapprehension of the circuit court's opinion. Contrary to Respondent's assertion, the circuit court did not find that "Texas law is clear" in not permitting a contribution claim among settling co-obligors. At most, the circuit court found that Texas law is silent on that question. And despite Respondents' argument to the contrary, the three federal courts each relied on different legal principles to resolve the matter.

These narrow facts present an opportunity to provide guidance on certification without curtailing the broad discretion normally afforded to lower courts in evaluating the merits of certification.

I. MR. SHERMAN PROPERLY DESCRIBED THE ISSUE AS IMPLICATING CORE FEDERALISM CONCERNS.

Because this case presents certification in a non-diversity case not involving *Pullman* abstention, it directly implicates the balance between national and state judicial power. These concerns are at their height in a case like this one, presenting an important state-law issue without clear guidance from state courts, decided on policy grounds by federal courts.

A. The Issue Is Important To Texas Law.

This case could affect settlement of scores of Texas lawsuits involving multiple defendants. If left undisturbed, the circuit court's opinion permits settling Texas defendants who agreed to share in the burden of settlement to walk away without liability when a co-obligor pays the joint and several obligation—leaving the paying co-obligor with no recourse.

Respondents accuse Mr. Sherman of inflating this case's importance to Texas law, yet Respondents themselves contend that permitting contribution "would make settlements in cases with multiple defendants difficult if not impossible to consummate" (Brief in Opposition at 13). According to Respondents, "[n]othing could be more destructive of the willingness of parties to settle cases . . . ." (*Ibid* at 12). If true, these statements necessarily mean that the situation presented by this case—multiple settling defendants with a joint and individual obligation—is a frequent occurrence in Texas. By

Respondents' own analysis, then, resolution of this case is important to Texas law.

B. Old Texas Cases Support Mr. Sherman.

Respondents contend that all three lower courts found Texas law to be "clear" in rejecting contribution. The circuit court certainly did not find any such clarity, explicitly noting that in some cases, "Texas courts have recognized the right to contribution in language broad enough to be construed to cover the situation here . . . ." (Petition App. at 4a).

The circuit court's statement that Texas courts have "not found occasion to extend the contribution right implied in guaranty and surety agreements to other types of contracts" (Petition App. at 5a) was a reiteration of its belief that the question is one of first impression in Texas; it was not, as Respondents intimate, any indication that governing Texas case law has rejected such a claim. Saying that Texas courts have not been presented with a claim is very different from saying they have considered and rejected it.

Respondents continue to argue that only an ordinary financial guaranty was at issue in *Faires* v. *Cockrill*, 31 S.W. 639 (Tex. 1895). That argument might have merit were it not for the court's explicit statement in the subsequent appeal that "the duties and liabilities of these guarantors, as between themselves, was not in all respects the same as those existing between the guarantors of a note . . . ." *Mateer* v. *Cockrill*, 45 S.W. 751 (Tex. Civ. App. 1898). In fact, from the very start, the Texas

Supreme Court made clear the rule embraces all species of contracts:

> When two or more persons enter into a joint and several obligation by which they agree to pay a sum of money to, *or to do something for*, another, the law implies a promise from each of such obligors to each of the others that each will indemnify the other in case he pays *or performs* more of the obligation than his proportional part.

Faires, 31 S.W. at 193 (emphasis added). The phrase "pay a sum of money to, or to do something for" indicates plainly that the rule extends to contractual obligations besides the payment of money.

In any event, all this begs the question; the issue presented by Mr. Sherman's petition is whether it should be a national or state court that decides the meaning and import of these Texas cases. The circuit court made no attempt to distinguish *Faires* on the basis urged by Respondents or otherwise. From the comments made in oral argument, it appears the court simply viewed these cases as being too old.

C. The Federal Courts Used Different Grounds To Decide The Case.

Respondents characterize the three different federal court theories in this case as three independent and consistent rationales for rejecting Mr. Sherman's claim. Mr. Sherman sees no point to arguing at length about what the opinions say, as they are appended to his petition. Suffice it to say

that the bankruptcy court applied a line of Texas cases involving non-settling joint tortfeasors. Neither the district court nor the circuit court even mentioned this theory—despite Respondents' continued reliance on it throughout the litigation. While the district court and circuit court opinions are more similar in their reliance on certain factors—particularly the need to determine an equitable division among the Respondents—substantial portions of the two opinions make clear their very different approaches to the issue.

D. The Circuit Court Relied on Policy Grounds To Decide The Case.

To be sure, the circuit court did not decide the matter solely on public policy grounds; the court also examined the underlying contract and attempted to determine the parties' reasonable expectations under it. But Respondents' claim that public policy was not a consideration is belied by the opinion itself. The circuit court explicitly held that "[t]he difficulty of equitably apportioning contribution here weighs against implying the remedy" (Petition App. at 7a). In other words, the circuit court decided that the difficulties in adjudicating liability outweighed the interest in affording a co-obligor the contribution remedy—a policy decision.

The danger in permitting the federal court to impose its policy judgment is that in other contexts, Texas courts have apparently deemed the disquieting of litigation to be an acceptable cost. After all, Texas law permits a contribution claim by one judgment debtor against another. *Greenspan* v. *Green*, 255 S.W.2d 917 (Tex. Civ. App. – Dallas

1953, writ ref'd n.r.e). Similarly, Texas courts might deem policy considerations favoring enforcement of co-obligor liabilities in a settlement agreement to be more important than the potential disquieting of litigation. But without certification, neither the circuit court nor any other court will know how the Texas Supreme Court would weigh these competing policy considerations.

II. THIS CASE PRESENTS CONSIDERATIONS LIKE THOSE IN *LEHMAN BROS.*

As Mr. Sherman pointed out in his petition, this case presents an even more compelling case for certification than the facts in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), where this Court vacated a circuit court's decision and remanded for certification. Mr. Sherman never suggested that the facts in this case are identical to those in *Lehman Bros.*; indeed, he took pains to point out differences (Petition at 10). Instead, he argued that the underlying analysis in *Lehman Bros.* appears to suggest that certification is similarly appropriate in this case. And he certainly pointed out the lack of clarity and consistency among lower courts in applying the discretion afforded to them regarding the propriety of certification. As a result, the additional guidance this Court might present through this case will inform future use of certification in non-diversity, non-*Pullman* cases.

CONCLUSION

Based on this Court's decision in *Lehman Bros.*, and principles of comity and federalism, the petition for a writ of certiorari should be granted. Alternatively, this Court should vacate the circuit

court's decision and remand the case for certification.

Respectfully submitted,

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